

Plain English: The Basics

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Do you remember drafting your first Complaint? You found a sample from another case and copied the format. Your first paragraph probably looked something like this:

COMES NOW the Plaintiff herein, John Smith, by and through his undersigned counsel and the law firm of Kirk, Spock, and McCoy, P.C., and pursuant to the Colorado Rules of Civil Procedure, for his Complaint against the Defendant herein, Mary Jones, states and alleges as follows:

That is 46 words. It is a fine example of “Legalese.”¹

Why do so many lawyers write like this? The reasons are many. Law schools traditionally taught that law is a rigorous intellectual discipline and requires a writing style to match. Some lawyers adopt a formal tone to sound authoritative. Others use bloated language to delay a meaningful response or action. A few intentionally write to confuse or mislead. Many lawyers mistakenly believe this style impresses clients, opposing counsel, and judges. And, let’s face it, Legalese serves lawyers well because it befuddles clients and makes them more dependent on us.

The plain English movement, sometimes called the plain language movement, seeks to promote the use of plain English over Legalese in business and law. Plain English is writing that is clear, concise, and readily understood by the target audience. The use of plain English lowers costs, improves productivity, increases credibility and reduces misunderstandings.²

The fundamental purpose of any document is to convey information. Common sense suggests writing that is clear, concise, and readily understood by its target audience is a worthy goal. Unfortunately, too many lawyers fill their documents with ambiguities, double negatives, jargon, lengthy sentences, massive paragraphs, needless words, passive voice, poor sentence structure, redundancies, distracting footnotes, sexist language, undefined terms and worthless boilerplate.

There is no formula for the perfect document. There is no perfect document. But there are accepted principles of good writing.³ There are also many techniques certain to make any document unnecessarily long and confusing. No single article can identify all the principles of plain English, but this article attempts to summarize some of its most important tenets.

¹ Like “hard-core pornography,” you may not be able to define “Legalese” precisely, but you know it when you see it. See, *Jacobellis v. Ohio*, 378 U.S. 184 (1964), concurrence of Justice Stewart.

² For a comprehensive list of the many studies conducted on the benefits of plain English, see Kimble, *Writing for Dollars, Writing to Please*, Carolina Academic Press (2012) at Part 5.

³ Contrary to what you learned in high school, it is fine to begin a sentence with “But” or “And.”

1. Think Before Writing. The most important principle is to think about what you want to say before you start writing. Pressed for time, too many lawyers just start typing or dictating, completely failing to think about what they want to say and how to say it in a sensible order. Often one sentence or paragraph does not logically flow from the prior one. This causes confusion and reduces trust. Equally important, by failing to really think about what they want to say lawyers may base conclusions on hidden assumptions or faulty logic.

2. Omit unnecessary words. As a rule, the quality of a document is inversely proportionate to its length. It took a long time to allow myself the freedom to do this, but now when I draft a Complaint, the first paragraph looks like this:

Plaintiff alleges:

That is 2 words rather than 46. Nothing more is needed. The caption identifies the parties, their status as plaintiff or defendant, and the lawyer or firm filing the Complaint for the Plaintiff. The caption labels the document a “Complaint,” so a second reference to that fact is not necessary. Reference to the Colorado Rules of Civil Procedure is also unnecessary; we assume the Plaintiff relies on those if the Plaintiff files in a Colorado court.

3. Prefer simple words to complex words. Which is better, *prior to* or *before*? *Before* is simpler – it is one word rather than two and consumes six spaces instead of eight. Avoid *here-*, *there-*, and *where-* words – words such as *hereby*, *therein*, and *wherefore*. And don’t even get me started on *aforementioned* or *hereinafter*.

4. Look for bloated phrases that can be condensed. For example, rather than write *notwithstanding the fact that*, use *although*.

5. Watch out for “of.” One useful trick is to search for “of.” It often signifies wordiness. Rather than write, *The Court previously advised the Defendant of the fact that there was no factual basis for such an instruction*, try: *The Court previously advised the Defendant that there was no factual basis for such an instruction*.

6. Watch out for “that” and “which.” “That” and “which” are often unnecessary. For example, the last sentence in paragraph 5 could be written: *The Court previously advised the Defendant there was no factual basis for such an instruction*.

7. Use short sentences and paragraphs. Accepted readability formulas such as the Flesch Reading Ease Scale rely heavily on sentence and paragraph length. Try to keep your *average* sentence length to 20 or 25 words. A long sentence usually indicates you are trying to say too many things at once. The same applies to paragraphs; try to keep the *average* number of sentences in a paragraph to five or six.⁴

⁴ Microsoft Word’s grammar check function offers the ability analyze the readability of any document. It tells you the number of words in the document, the number of characters, the number of paragraphs, and the number of sentences. It provides the average sentences per paragraph, the average words per sentence, and the average number of character per word. It also provides the percentage of sentences that employ passive

8. Prefer active voice to passive voice. In an active voice construction, the subject of the sentence does something. In a passive voice construction, something is done to the subject. *The Court denied the Motion* is active voice. *The Motion was denied by the Court* is passive voice. Active voice usually requires fewer words and better reflects the chronology of events. If you have trouble spotting examples of passive voice, look for *be*-verbs (*is, are was* or *were*) followed by a verb ending in *-ed*. For instance, *The Motion was denied*.

9. Avoid multiple negatives. For example, instead of *No more than one officer may be in the courtroom as an advisory witness*, write, *Only one officer may be in the courtroom as an advisory witness*.

10. Use verbs, not nominalization. A verb that has been converted to a noun is called a “nominalization.” For instance, “Please *state* why you *object*,” becomes “Please make a *statement* as to why you are *making an objection*.”

11. Avoid redundant legal phrases. Phrase such as *null and void* or *rest, residue, and remainder* are unnecessary. Many of these traditional phrases are remnants from a time when legal documents needed to contain Latin, English, and French words to satisfy all parties to a transaction.

12. Avoid gaps between subject, verb and object. Most sentences should follow the normal English word order: subject, verb, and then object (if any). Consider this example from Richard Wydick’s *Plain English for Lawyers*:

The proposed statute gives to any person who suffers financial injury by reason of discrimination based on race, religion, sex, or physical handicap a cause of action for treble damages.

There is a 21-word gap between the verb (gives) and the object (cause of action). One remedy is to make two sentences. Another is to move the intervening words to the end of the sentence:

The proposed statute gives a cause of action for treble damages to any person who suffers financial injury because of discrimination based on race, religion, sex, or physical handicap.

13. Use personal pronouns, especially in consumer documents. In consumer documents, consider making the consumer “you” and the organization “we.” That makes the document easier to read than one that uses “customer” and “company.”

14. Refer to people and companies by name. For example, rather than using “Lessor” and “Lessee,” use “Smith” for the “Lessor” and “Jones” in place of “Lessee.”

voice and tells you how the document scores on the Flesch Reading Ease Scale and the Flesch-Kincaid Grade Level Scale. There are also similar open source programs such as Abiword.

15. **When necessary, make a list.** Sometimes the best way to present a set of conditions, or exceptions, or closely related ideas is with an introductory clause followed by a list.⁵

Legalese endures today for several reasons. Many cost-conscious clients are more concerned with results than the quality of legal drafting. It is a paradox that a lawyer may be able to charge more for a 40-page lease than for a 10-page lease, even though drafting the 10-page lease required more time.

If you would like to learn more practical skills to improve your ability to translate Legalese into plain English, there are several good books available filled with helpful examples. They are *Legal Writing in Plain English* by Bryan A. Garner and *Plain English for Lawyers* (5th ed.) by Richard C. Wydick. In addition, the U.S. Securities and Exchange Commission created a Plain English Handbook that is available free at <http://www.sec.gov/pdf/handbook.pdf>

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Mark Cohen is Chairperson of The Colorado Lawyer Board of Editors. He authored six articles in the *Am.Jur Proof of Fact* series and wrote two acclaimed mysteries. His practice focuses on drafting and reviewing documents, and litigating disputes that arise out of poorly drafted documents.

⁵ Reed Dickerson, *The Fundamentals of Legal Drafting* 115-24 (2nd ed. Little, Brown 1986)